85-499



# NO. 85-

## In the Supreme Court of the United States
**OCTOBER TERM, 1985**

**B.H. PAPASAN,**
**Superintendent of Education, Et Al.**
**Petitioners**

**versus**

**WILLIAM A. ALLAIN,**
**Governor, State of Mississippi, Et Al.**
**Respondents**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. May school children be afforded prospective injunctive relief to remedy current conditions resulting from a breach by state officials of the federal school lands trust?

2. Can a discriminatory denial of a minimally adequate free public education to some children constitute a violation of the equal protection clause of the fourteenth amendment?

## LISTING OF PARTIES

Petitioners:

B.H. PAPASAN, Superintendent of Public Education, Tunica County School District, Tunica, Mississippi;
WESLEY BAILEY, Member, Board of Education, Tunica County School District, Tunica, Mississippi;
JOHN E. MATTHEWS, Board of Education, Tunica County School District, Tunica, Mississippi;
RICHARD HUSSEY, Member, Board of Education, Tunica County School District, Tunica, Mississippi;
E.M. HOOD, JR., Member, Board of Education, Tunica County School District, Tunica, Mississippi;
CLIFFORD GRANBERRY, Member, Board of Education, Tunica County School District, Tunica, Mississippi;
JAMES E. HATHCOCK, Superintendent, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
JIM YOUNG, Trustee, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
RUSSELL JACKSON, Trustee, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
FAITH WEST, Trustee, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
KELLY TUCKER, Trustee, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
DON BETHAY, Trustee, Aberdeen Municipal Separate School District, Aberdeen, Mississippi;
TONY V. PARKER, Superintendent of Public Education, Alcorn County School District, Corinth, Mississippi;
H.T. BENDERMAN, Member, Board of Education, Alcorn County School District, Corinth, Mississippi;



RAY HUGHES, Member, Board of Education, Alcorn County School District, Corinth, Mississippi;
FRANK ELDRIDGE, Member, Board of Education, Alcorn County School District, Corinth, Mississippi;
BOBBY CALDWELL, Member, Board of Education, Alcorn County School District, Corinth, Mississippi;
HERSCHEL WILBANKS, Member, Board of Education, Alcorn County School District, Corinth, Mississippi;
HOLACE MORRIS, Superintendent, Amory Municipal Separate School District, Amory, Mississippi;
HERMON HESTER, Trustee, Amory Municipal Separate School District, Amory, Mississippi;
DAVID HODO, Trustee, Amory Municipal Separate School District, Amory, Mississippi;
EDDIE WOMBLE, Trustee, Amory Municipal Separate School District, Amory, Mississippi;
W.G. PRUEITT, Trustee, Amory Municipal Separate School District, Amory, Mississippi;
THOMAS GREER, Trustee, Amory Municipal Separate School District, Amory, Mississippi;
DOUGLAS AUTRY, Superintendent of Public Education, Benton County, School District, Ashland, Mississippi;
LAFAY WEATHERLY, Member, Board of Education, Benton County School District, Ashland, Mississippi;
SHIRLEY MOHUNDRO, Member, Board of Education, Benton County School District, Ashland, Mississippi;
MINNIE LEE CHILDERS, Member, Board of Education, Benton County School District, Ashland, Mississippi;
JOHN DAUGHTERY, Member, Board of Education, Benton County School District, Ashland, Mississippi;

JOE GRIST, Member, Board of Education, Benton County School District, Ashland, Mississippi;
GRADY FERGUSON, Superintendent of Education, Calhoun County School District, Pittsboro, Mississippi;
MIKE DUNAGIN, Member, Board of Education, Calhoun County School District, Pittsboro, Mississippi;
BROOKS BRASHER, Member, Board of Education, Calhoun County School District, Pittsboro, Mississisppi;
CHARLIE CLARK, Member, Board of Education, Calhoun County School District, Pittsboro, Mississippi;
CHARLES C. HARDIN, Member, Board of Education, Calhoun County School District, Pittsboro, Mississippi;
PAUL LOWE, Member, Board of Education, Calhoun County School District, Pittsboro, Mississippi;
O. WAYNE GANN, Superintendent, Corinth Municipal Separate School District, Corinth, Mississippi;
GLEN PARKER, Trustee, Corinth Municipal Separate School District, Corinth, Mississippi;
SARAH HARRIS, Trustee, Corinth Municipal Separate School District, Corinth, Mississippi;
J.B. DARNELL, Trustee, Corinth Municipal Separate School District, Corinth, Mississippi;
WILLIE DAVIS, Trustee, Corinth Municipal Separate School District, Corinth, Mississippi;
JOHN BREWER TOMLINSON, JR., Trustee, Corinth Municipal Separate School District, Corinth, Mississippi;
ALBERT L. BROADWAY, Superintendent of Public Education, DeSoto County School District, Hernando, Mississippi;
ROBERT C. DICKEY, Member, Board of Education, DeSoto County School District, Hernando, Mississippi;



HARVEY G. FERGUSON, JR., Member, Board of Education, DeSoto County School District, Hernando, Mississippi;
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HAROLD O. MOORE, Member, Board of Education, DeSoto County School District, Hernando, Mississippi;
MARTHA TACKETT, Member, Board of Education, DeSoto County School District, Hernando, Mississippi;
DWIGHT SHELTON, Superintendent, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;
ROBERT HILL, Trustee, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;
PARKER BELL, Trustee, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;
DONALD STREET, Trustee, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;
TRUDY BYARD, Trustee, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;
CHRISTINE RATCLIFF, Trustee, Holly Springs Municipal Separate School District, Holly Springs, Mississippi;
JERRY STONE, Superintendent, Iuka Special Municipal Separate School District, Iuka, Mississippi;
C. NEIL DAVIS, Trustee, Iuka Special Municipal Separate School District, Iuka, Mississippi;
CHARLES LEWIS, Trustee, Iuka Special Municipal Separate School District, Iuka, Mississippi;
NEIL SCHILLINGS, Trustee, Iuka Special Municipal Separate School District, Iuka, Mississippi;
FRANK JIMMAR, Trustee, Iuka Special Municipal Separate School District, Iuka, Mississippi;

STANLEY DEXTER, Trustee, Iuka Special Municipal Separate School District, Iuka, Mississippi;
JIMMY LYNN NELSON, Superintendent of Public Education, Lafayette County School District, Oxford, Mississippi;
EARL BABB, Member, Board of Education, Lafayette County School District, Oxford, Mississippi;
JAMES E. HAMILTON, Member, Board of Education, Lafayette County School District, Oxford, Mississippi;
JAMES C. STONE, Member, Board of Education, Lafayette County School District, Oxford, Mississippi;
WILLIAM BUFORD, Member, Board of Education, Lafayette County School District, Oxford, Mississippi;
C.W. WHITE, Member, Board of Education, Lafayette County School District, Oxford, Mississippi;
JAMES R. BRYSON, Superintendent, New Albany Municipal Separate School District, New Albany, Mississippi;
BOBBY GAULT, Trustee, New Albany Municipal Separate School District, New Albany, Mississippi;
BEN KITCHENS, Trustee, New Albany Municipal Separate School District, New Albany, Mississippi;
DAVID HOLMES, Trustee, New Albany Municipal Separate School District, New Albany, Mississippi;
DR. DAVID ELLIS, Trustee, New Albany Municipal Separate School District, New Albany, Mississippi;
MALCOLM HICKEY, Trustee, New Albany Municipal Separate School District, New Albany, Mississippi;
HOSEA A. GRISHAM, Superintendent, North Panola Consolidated School District, Sardis, Mississippi;
DEMSEY COX, Trustee, North Panola Consolidated School District, Sardis, Mississippi;



CHARLES BLAKELY, Trustee, North Panola Consolidated School District, Sardis, Mississippi;
TAYLOR JEFF McLEOD, Trustee, North Panola Consolidated School District, Sardis, Mississippi;
REID P. DORR, Trustee, North Panola Consolidated School District, Sardis, Mississippi;
POLLY GORDON, Trustee, North Panola Consolidated School District, Sardis, Mississippi;
BILLY D. STROUPE, Superintendent, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
TATE RUTHERFORD, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
FRANCIS HOPPER, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
JOE McMILLAN, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
BILLY H. AYERS, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
J.W. McMILLAN, Trustee, North Tippah Consolidated School District, Tiplersville, Mississippi;
DR. BOB McCORD, Superintendent, Oxford Municipal Separate School District, Oxford, Mississippi;
LEONARD E. THOMPSON, Trustee, Oxford Municipal Separate School District, Oxford, Mississippi;
REBECCA L. MORETON, Trustee, Oxford Municipal Separate School District, Oxford, Mississippi;
RONALD F. BORNE, Trustee, Oxford Municipal Separate School District, Oxford, Mississippi;
DOROTHY B. HENDERSON, Trustee, Oxford Municipal Separate School District, Oxford, Mississippi;

W.N. LOVELADY, Trustee, Oxford Municipal Separate School District, Oxford, Mississippi;
JOE B. HARTLEY, Superintendent of Public Education, Panola County School District, Batesville, Mississippi;
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TRAVIS D. MURPHREE, Member, Board of Education, Panola County School District, Batesville, Mississippi;
CECIL WARDLAW, Member, Board of Education, Panola County School District, Batesville, Mississippi;
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BUDDY MONTGOMERY, Trustee, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
LARRY YOUNG, Trustee, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
THOMAS CHEWE, Trustee, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
RAY LEEPER, JR., Trustee, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
JEAN MAPP, Trustee, Pontotoc Municipal Separate School District, Pontotoc, Mississippi;
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EDWIN BROWN, Member, Board of Education, Prentiss County School District, Booneville, Mississippi;



LARRY JOE CROSBY, Member, Board of Education, Prentiss County School District, Booneville, Mississippi;
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DAVID C. COLE, Superintendent, South Panola Consolidated School District, Senatobia, Mississippi;
BRYANT WOODRUFF, Trustee, South Panola Consolidated School District, Batesville, Mississippi;
O.T. MARSHALL, Trustee, South Panola Consolidated School District, Batesville, Mississippi;
J.H. MOORE, Trustee, South Panola Consolidated School District, Batesville, Mississippi;
ALTON MILAM, Trustee, South Panola Consolidated School District, Batesville, Mississippi;
LEONARD MORRIS, Trustee, South Panola Consolidated School District, Batesville, Mississippi;

JACK HARRIS, Superintendent, South Tippah Consolidated School District, Ripley, Mississippi;
CLARENCE STANFORD, Trustee, South Tippah Consolidated School District, Ripley, Mississippi;
EDWARD BURGE, Trustee, South Tippah Consolidated School District, Ripley, Mississippi;
T.C. MAUNEY, JR., Trustee, South Tippah Consolidated School District, Ripley, Mississippi;
J.C. NEWBY, Trustee, South Tippah Consolidated School District, Ripley, Mississippi;
H.L. HELLUMS, Trustee, South Tippah Consolidated School District, Ripley, Mississippi;
DONALD MERRITT CLANTON, Superintendent Of Public Education, Tate County School District, Senatobia, Mississippi;
BYRON DURLEY, Member, Board of Trustees, Tate County School District, Senatobia, Mississippi;
ROBERT BARRY EMBREY, Member, Board of Trustees, Tate County School District, Senatobia, Mississippi;
STEVE BENTON LENTZ, Member, Board of Trustees, Tate County School District, Senatobia, Mississippi;
HUEL STANLEY BLAIR, Member, Board of Trustees, Tate County School District, Senatobia, Mississippi;
SAMMY BENFORD ASHE, Member, Board of Trustees, Tate County School District, Senatobia, Mississippi;
DR. JULIAN PRINCE, Superintendent, Tupelo Municipal Separate School District, Tupelo, Mississippi;
AARON MORGAN, Trustee, Tupelo Municipal Separate School District, Tupelo, Mississippi;
JIMMY FLOYD, Trustee, Tupelo Municipal Separate School District, Tupelo, Mississippi;



MRS. DOYCE REAS, Trustee, Tupelo Municipal Separate School District, Tupelo, Mississippi;
CHARLIE GREEN, Trustee, Tupelo Municipal Separate School District, Tupelo, Mississippi;
STEVE NORWOOD, Trustee, Tupelo Municipal Separate School District, Tupelo, Mississippi;
SAMMY S. DOWDY, Superintendent of Public Education, Union County School District, New Albany, Mississippi;
L.H. PARNELL, Member, Board of Education, Union County School District, New Albany, Mississippi;
CLEO FOOSHEE, Member, Board of Education, Union County School District, New Albany, Mississippi;
GARLAND GRAY, Member, Board of Education, Union County School District, New Albany, Mississippi;
IRA KUYKENDALL, Member, Board of Education, Union County School District, New Albany, Mississippi;
PALMER SMITH, Member, Board of Education, Union County School District, New Albany, Mississippi;
ALFRED S. REED, JR., Superintendent, Water Valley Line Consolidated School District, Water Valley, Mississippi;
FRANK B. BROOKS, Trustee, Water Valley Line Consolidated School District, Water Valley, Mississippi;
LILLY B. HORAN, Trustee, Water Valley Line Consolidated School District, Water Valley, Mississippi;
DANNY ROSS INGRAM, Trustee, Water Valley Line Consolidated School District, Water Valley, Mississippi;
BENNIE COLE TAYLOR, Trustee, Water Valley Line Consolidated School District, Water Valley, Mississippi;
JOHN EDDIE ROGERS, Trustee, Water Valley Line Consolidated School District, Water Valley, Mississippi;

TOM LOTT, Superintendent, West Point Municipal Separate School District, West Point, Mississippi;
ROBERT L. CALVERT, III, Trustee, West Point Municipal Separate School District, West Point, Mississippi;
PETER THOMAS HODO, JR., Trustee, West Point Municipal Separate School District, West Point, Mississippi;
JOHN H. PARKER, SR., Trustee, West Point Municipal Separate School District, West Point, Mississippi;
WILLIAM LESLIE CHRISTIAN, Trustee, West Point Municipal Separate School District, West Point, Mississippi;
CORNELIA WALKER, Trustee, West Point Municipal Separate School District, West Point, Mississippi;

LASONDRA ADDISON, a minor, by and through her mother and next friend, Linda Addison;
CHARLES RAY ALLEN, II, a minor, by and through his father and next friend, Charles Ray Allen;
NANCY ELIZABETH BEEBE, a minor, by and through her father and next friend, Robert John Beebe;
PHYLLIS CAROL BELL, a minor, by and through her father and next friend, Wallace L. Bell;
KERRY MILLS BRYSON, a minor, by and through his father and next friend, James R. Bryson;
JONATHAN ANDREW BUNCH, a minor, by and through his father and next friend, Austin W. Bunch;
MELISSA ANNE CLEMMONS, a minor, by and through her father and next friend, John Edgar Clemmons, Jr.;
CARL RICKEY COLEMAN, a minor, by and through his father and next friend, Albert Coleman;
DEE ANN COX, a minor, by and through her father and next friend, Bobby Joe Cox;
VICKI DENISE GANN, a minor, by and through her father and next friend, O. Wayne Gann;



GALEN VINCENT HENDERSON, a minor, by and through his father and next friend, G.W. Henderson, Jr.;
SHERRY RENAE HOGUE, a minor, by and through her father and next friend, Charles Archer Hogue;
YOLANDA JACKSON, a minor, by and through her mother and next friend, Sarah A. Jackson;
FLORENCE DENISE JONES, a minor, by and through her father and next friend, Cleveland Hoover Jones;
AMY J. LIVINGSTON, a minor, by and through her father and next friend, Stephen Price Livingston, Sr.;
MINNIE LUCILLE LONG, a minor, by and through her father and next friend, John Henry Long;
UNSELD MASON, a minor, by and through his mother and next friend, Shirley Mason;
PRELNA RENEE McNEIL, a minor, by and through her mother and next friend, Juanita W. McNeil;
CHRISTOPHER DOUGLAS PRUETT, a minor, by and through his father and next friend, Kenneth Douglas Pruett;
SCOTTY GLEN PURDEN, a minor, by and through his grandmother, guardian and next friend, Grace Purden;
SAMMY CLARK RICHEY, a minor, by and through his father and next friend, Samuel Larry Richey;
RYAN K. ROBINSON, a minor, by and through his mother and next friend, Mary K. Robinson;
THOMAS JASON RUSSELL, a minor, by and through his father and next friend, Jimmy Darrell Russell;
MICHAEL EDWARD SMITH, a minor, by and through his father and next friend, Ralph Edward Smith;
SHARLENE ANN STOREY, a minor, by and through her father and next friend, Thomas B. Storey;
WALTER LEE WELCH, a minor, by and through his mother and next friend, Francis Onell Welch;

JAMES MIKE WORTHAM, a minor, by and through his mother and next friend, Inell Corbitt Wortham;
DANIEL GRIFFIN WREN, a minor, by and through his father and next friend, Tommy Wayne Wren.

Respondents:

WILLIAM A. ALLAIN, Governor, State of Mississippi;
RICHARD MOLPUS, Secretary of State and Member of the Board of Education and Member of the Lieu Land Commission, State of Mississippi;
RICHARD A. BOYD, Superintendent of Education and Member of the Board of Education and Member of the Lieu Land Commission, State of Mississippi;
EDWIN LLOYD PITTMAN, Attorney General and Member of the Board of Education and Member of the Lieu Land Commission, State of Mississippi;
CONNIE SLAUGHTER-HARVEY, Assistant Secretary of State, State of Mississippi

The original federal defendants have, by joint stipulation, been dismised from this lawsuit. The federal defendants no longer have an interest in this case and are not parties to the petitioning of this Court.



TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

Constitutions and Statutes:

NO. 85-

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

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B.H. PAPASAN, Superintendent
of Education, et al.
Petitioners

versus

William A. ALLAIN, Governor,
State of Mississippi, et al.
Respondents

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

## PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit regarding the panel decision dated April 5, 1985 and the denial of the Petition for Rehearing and Suggestion for Rehearing En Banc dated May 21, 1985.



## OPINIONS BELOW

Court of Appeals: The panel decision of the Court of Appeals for the Fifth Circuit, dated April 5, 1985, is reported as Papasan v. United States, 756 F.2d 1087 (1985) (Appendix (2) at A-3). The Order denying rehearing or rehearing en banc was issued on May 21, 1985 (Appendix (1) at A-1).

District Court: The Order dismissing with prejudice is unpublished (Appendix (3) at A-37).

## JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was delivered on April 5, 1985. A timely petition for panel rehearing and a suggestion for rehearing en banc was denied May 21, 1985. Application was made to Justice White for an extension of time wherein to file this petition and such application was granted on August 6, 1985, ordering an extension until September 18, 1985. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1948).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I § 10

> "No State shall...pass any...Law impairing the Obligation of Contract..."

U.S. Const. amend. XIV, § 1

> "....No state shall...deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 (1979)

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects or causes to be subjected, any citizen...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."



## STATEMENT OF THE CASE

There is a line drawn across the State of Mississippi that divides its schoolchildren into two classes. To one class--the children of twenty-three "Chickasaw Cession" counties in North Mississippi--the State has chosen to deny the funds necessary for a minimally adequate education. To the other class--the children of the fifty-nine southern Mississippi counties--the State arbitrarily allows the benefit of the entire income from the federally-created school lands trust. The school lands trust fund, a critical element of school funding in Mississippi, provides schools in the counties south of the line $31.25 per pupil each year. For the Chickasaw Cession counties, Mississippi officials, in lieu of school land trust income, appropriate 80¢ per pupil each

year.[1] This difference in benefit is not an accidental by-product of a system of administration of local lands by local schools, but is rather a result of an irrational discrimination by state officials against the schoolchildren of North Mississippi.

The long history of congressional action designed to impose upon the states a binding perpetual trust obligation to use certain segments of granted lands, as well as any revenue generated from their sale or lease, for the support of public schools is well documented. See Andrus v. Utah, 446 U.S. 500, 523-528 (1980)(Powell, J. dissenting). This case presents a gross abuse of that obligation by the officials of the State of Mississippi. In the Chickasaw Cession counties, Mississippi officials, without the prior authority of the federal settlor, sold the lieu lands that constituted the corpus of the federally-created[2] trust for a grossly inadequate price, then lost the proceeds by investing them in fixed-interest "loans" to railroad companies that failed. After these railroads failed, ignoring its duty to treat all trust beneficiaries equally, state officials substituted a fixed payment for the lost income from the trust.

Each county outside the Chickasaw Cession maintains control over the school trust lands located in those counties. State officials have delegated management to each such county locally and allowed local use of the entire income from the trust.

These facts were asserted in the complaint filed on June 12, 1981 on behalf of the schoolchildren in the United States

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1 Lead plaintiff "B.H. Papasan" is the Superintendent of Education for Tunica County, Mississippi. Latest census figures show that, with the exception of a leper colony in Hawaii on Molokai, Tunica is the poorest county in the nation.

2 The original federal defendants have, by joint stipulation, been dismissed from this lawsuit. The federal defendants no longer have an interest in this case and are not parties to the petitioning of this Court.

District Court for the Northern District of Mississippi. The complaint raised equal protection and federal trust claims (U.S. Const. amend. XIV, § 1; 42 U.S.C. 1983 (1979)). The complaint also raised a contracts clause claim, based on the state's violations of its contractual obligations as trustees of the school lands trust (U.S. Const. art. I, § 10). The complaint sought prospective, injunctive relief from the state officials responsible for the school lands trust.

The schoolchildren's attempts to obtain discovery and class certification were held in abeyance. Three-and-a-half months after the complaint was filed, the state Defendants--who have never answered the complaint--filed a motion to dismiss.[3] While affirmative defenses were raised, the sufficiency of the equal protection, federal

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[3] Given the procedural posture of this case, all assertions by the schoolchildren as to the manner, and degree, of their deprivation must be accepted as true.



trust, and contract clause claims was not questioned.

Circuit Judge J.P. Coleman, sitting by special designation as a district judge,heard the motion to dismiss sixteen months after it was filed. He held the motion under advisement for eleven months, and dismissed the complaint without an opinion, holding that all claims--including those for prospective, injunctive relief--were barred by the eleventh amendment or the statute of limitations. On appeal, the Fifth Circuit not only held that the eleventh amendment barred the federal trust claim, but also addressed and rejected the equal protection claim on its merits--though the merits of this claim had never been briefed or argued.

## REASONS FOR GRANTING THE WRIT

### FIRST QUESTION

### MAY SCHOOLCHILDREN BE AFFORDED PROSPECTIVE INJUNCTIVE RELIEF TO REMEDY CURRENT CONDITIONS RESULTING FROM A BREACH BY STATE OFFICIALS OF THE FEDERAL SCHOOL LANDS TRUST?

#### A. This Case Poses A Significant Unsettled Question As To How A Trust, Created By The Federal Government and Managed By A State As Trustee, Is To Be Judicially Enforced

This case raises issues concerning the obligations imposed upon the various states as trustees for the sixteenth-section lands trusts. Between 1803 and 1962, the United States funded the school lands trust with some 78,000,000 acres of trust land. Lassen v. Arizona, 385 U.S. 458, 460 n.3 (1967). The trusts are held by the various states as trustee for the benefit of the school children in those states. An unresolved federal question of great importance is presented concerning the nature of the state's obligations as



trustee and the state's duties to cure breaches of those obligations.

The trusts originated in the federal land sales acts; the trusts were a result of contracts between the various states and the federal government. See Andrus v. Utah, 446 U.S. 500, 507 (1980)("school land grant was a 'solemn agreement' which in some ways may be analogized to a contract between private parties."); Cooper v. Roberts, 59 U.S. (18 How.) 339, 341 (1855) (characterized school land grant to Michigan as "compact" between Michigan and United States). In roughly two-thirds of the State of Mississippi, the State has retained the school lands and delegated

management locally.[1] But in the Chickasaw Cession, the State mandated the sale of all lieu lands for six dollars per acre.[2] This sale at an inadeqate price produced an undervalued corpus. The State then mandated that the funds from the sale be invested in specific railroad companies at a specific interest rate.[3] The State then lost its entire investment when the railroads failed.

After losing the small amount it had produced from the sale, the State set an arbitrary interest rate it would pay on the

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1 Miss. Code Ann. §§ 29-3-1 et seq. (1972) (providing an elaborate system under which school boards manage the land "under supervision of the state land commissioner...."); see Washington County v. Riverside Drainage District, 159 Miss. 102, 108, 131 So. 644, 645 (1931) ("...sixteenth section land is owned by the state, and...the various counties are simply the state's agents for administering the school trust....").

2 1848 Miss. Laws ch. III, at 62.

3 1856 Miss. Laws ch. LVI, at 141.



undervalued corpus it had lost.[4] Since taking the Chickasaw Cession's share of the trust, the State has made no effort to cure the effects of its misfeasance, either by redistribution of the corpus remaining in the balance of the state, or by other remedy that would assure the Chickasaw Cession school children of the funding they would have had if the mismanagement had not occurred. It is the state's present and continuing failure to so cure the effect of its misfeasance that forms the basis of the school lands trust claim. The school children sought prospective, injunctive

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4 Miss. Const. art. VIII, § 212 (1890).

relief.[5] The relief sought would either assure the school children of benefits from what remains of the trust lands in the rest of the state, or would provide the school children some reasonable equivalent.

This Court's most recent cases analyzing the trust, Andrus v. Utah and Lassen, provide little guidance in answering the questions presented concerning the duties of the trustee. Andrus v. Utah involved the narrow question of whether the Secretary of Interior had the authority to disapprove specific selections of lieu or indemnity lands made by the state. Andrus v. Utah, 446 U.S. at 520. In Lassen, this Court held that the specific terms of the statute creating the trust in Arizona required that the trust be compensated at fair market value for land taken for highways. Lassen, 385 U.S. at 469. Neither case resolves the important questions concerning trust managment presented in the case at bar.

Before these cases, the school lands trust had last been before this Court in Alabama v. Schmidt, 232 U.S. 168 (1914), which stated that the trust is "honorary" and unenforceable. 232 U.S. at 174. The state was thus held to have complete power to do whatever it wanted with the land, including lose it completely. This holding has obviously been overruled by Lassen, which required that the state could not divert school lands to other uses without compensating the trust for the full market

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5 The Fifth Circuit held that the federal trust claims necessarily involved retroactive relief because the claims originate in past misconduct. The Fifth Circuit so held despite the fact that the school children sought prospective, injunctive relief from the future injuries that will be sustained as a result of the state defendants' misconduct. The Fifth Circuit also ignored the allegations in the complaint of continuing state misfeasance in failing to equitably distribute the income from what remains of the trust. Papasan v. United States, 756 F.2d 1087, 1093-94 (1985).

value of the lands diverted.[6] In sum, the most recent cases concerning the trust--Andrus v. Utah and Lassen-- provide insufficient guidance as to how the trust may be enforced, and the only other case providing such guidance--Alabama v. Schmidt--is no longer good law.

How and to what degree past breaches of federally-imposed trusts may be remedied has been and remains the subject of this Court's current attention. Depending on the character of the trust, and the identity of the breaching party, this Court has reached widely varying results. For example, in Summa Corporation v. California ex rel. State Lands Commission, _____ U.S. ____, 80 L.Ed.2d 237 (1984), California, as trustee, breached the public

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6 Lassen, 385 U.S. at 469; see United States v. 111.2 Acres of Land in Ferry County, Washington, 293 F.Supp. 1042, 1049 (E.D. Wash. 1968) affirmed 435 F.2d 561 (9th Cir. 1970)("intimations" in Alabama v. Schmidt that trust is illusory "dispelled" by Lassen v. Arizona, 385 U.S. 458 (1967)).



tidelands trust when it failed to intervene in the 1852-73 patenting procedure. This Court held that the state had lost title because it had failed to assert its rights. 80 L.Ed.2d at 242-43, 246. Summa held the trustee was estopped by its failure to act; there was no issue raised as to the trustee's duty to make the beneficiary whole for the trustee's misfeasance. By contrast, in County of Oneida, New York v. Oneida Indian Nation, _____ U.S. _____, 84 L.Ed.2d 169 (1985), this Court held that purchases of Indian trust lands by New York in 1795--which violated the federal Indian lands trust--provided the basis for a federal common law remedy to restore the corpus of the trust to the Oneida Indians. 84 L.Ed.2d at 180.

There are several distinctive features of the trust in Oneida that are isomorphic with features of the trust in the instant case: (1) the agreements creating and securing the trust "did not establish a comprehensive remedial plan for dealing

with violations..." 84 L.Ed.2d at 181; (2) ratification of trust violations was attempted through subsequent acts of Congress, 84 L.Ed.2d at 186-87; and (3) the agreements and statutes underlying the trust contains clauses "voiding" land sales that are not made in compliance with the trust. 84 L.Ed.2d at 186. These isomorphisms between Oneida and the instant case appear to indicate that the school lands trust should be judicially enforced similarly to the Indian land trust. The Fifth Circuit, however, ignored Oneida[7] and without the aid of applicable precedent, and without any attempt to analyze the nature of the trust obligations, denied the schoolchildren's federal trust claim. This underscores the thoroughly unsettled nature of this significant federal question as to how

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[7] Despite extensive briefing on Oneida, the Fifth Circuit failed to even mention the case in its opinion.



federal school lands trusts may be judicially enforced.

### B. This Case Poses A Significant Unsettled Question As To Whether A State's Breach Of Obligations As Trustee Of a Federal Trust Violates The Contracts Clause

The statutes creating the school lands trust create obligations that are contractual in nature. See Andrus v. Utah, 446 U.S. at 507 ("school land grant was 'a solemn agreement'"). Justice Powell made a similar point in his dissent:

> As consideration for each new State's pledge not to tax federal lands, Congress granted the State a fixed proportion of the lands within its borders for the support of public education. [citations omitted]
>
> These agreements were solemn bilateral compacts between each State and the Federal Government. [citations omitted] For its part, the Government granted the State specific sections of land within each township laid out by federal survey.
>
> -Andrus, 446 U.S. at 523 (Powell, J. dissenting)

Any breach by the state of its duties as trustee is simultaneously a breach of these contractual obligations.

This court has recently held that a state's repudiations of its contract obligations can violate the contract clause. United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 24-28 (1977). This Court's cases, however, provide no guidance as to whether the contract clause is violated when the State commits a breach that does not amount to a repudiation of the contract duty. Furthermore, this Court's cases provide no guidance as to the limitations the contract clause places on a state's ability to ignore duties imposed by federal contracts creating trusts. These questions are of great importance both with regard to the school lands trust and with regard to other federally-created trusts.



## SECOND QUESTION

## CAN A DISCRIMINATORY DENIAL OF A MINIMALLY ADEQUATE FREE PUBLIC EDUCATION TO SOME CHILDREN CONSTITUTE A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

### A. This Case Poses A Significant Federal Question Concerning Whether Schoolchildren Who Are Discriminatorily Denied A Minimally Adequate Free Public Education May Be Entitled To Prospective Relief Under The Equal Protection Clause

This Court has made two principles clear: (1) a discriminatory absolute deprivation of educational opportunity will invoke intermediate scrutiny under the equal protection clause, Plyler v. Doe, 457 U.S. 202, 230 (1982); and (2) a mere inequality in funding among school districts where schcolchildren in all districts receive an adequate education will not invoke intermediate scrutiny under the equal protection clause, San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 24 (1973). There is a gap--a "twilight zone" if you will--between Plyler

and Rodriguez into which fall cases concerning schoolchildren who are not deprived absolutely of educational opportunity, but are deprived nonetheless of a minimally adequate education. This case, falling within that gap, presents the question whether a discriminatory non-absolute denial of a "minimally adequate" education would invoke intermediate scrutiny.

Discussions in Rodriguez and Plyler seem to indicate that discriminatory denial of a minimally adequate education would suffice to invoke intermediate scrutiny, under the equal protection clause

> "...some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."
>
> -Plyler, 457 U.S. at 221 (quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)).
>
> Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [voting or free speech rights], we have no indication that the present levels of educational expenditure in Texas provide an education that falls short.
>
> -Rodriguez, 411 U.S. at 36-37; see also 411 U.S. at 24-25 (Texas has made the guarantee of an "acceptable education"a primary function, and there is no proof refuting the state contention that it provides "an adequate education").



This language seems to imply the intermediate scrutiny is appropriate for less-than-absolute denials of a minimally adequate education. These implications were not followed by the Fifth Circuit, which construed Rodriguez and Plyler to require an absolute deprivation for intermediate review. 756 F.2d at 1095.

While the Fifth Circuit seemed certain about what Plyler and Rodriguez meant, other circuits have recognized that there is uncertainty as to how Plyler is to be interpreted.

> What is needed to invoke that standard [Plyler's intermediate scrutiny] is unclear....
>
> -United States v. Cohen, 733 F.2d 128, 136 (D.C. Cir. 1984).

> Plyler does not fit clearly into previous structures of equal protection analysis.
>
> -Gwin Area Community Schools v. State of Michigan 741 F.2d 840, 845 (6th Cir. 1984).

Resolution of the issue presented in this case--what it takes to warrant intermediate review in an education context--will remove this uncertainty.

### B. There Exists Conflict Between The Fifth Circuit and the Second, Seventh and Ninth Circuits Regarding The Proper Method of Analysis To Be Used For Rational Basis Review

Even if it is determined that low scrutiny is the proper level for evaluating non-absolute discriminatory deprivations of minimally adequate education, still a rational basis must be found for such a deprivation if it is to pass muster.

> The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike.



> [....]
>
> The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.
>
> -Cleburne v. Cleburne Living Center, _____ U.S. _____, 87 L.Ed.2d 313, 320 (1985).

Though holding that a rational basis existed for Mississippi's discriminatory system, the Fifth Circuit's opinion was devoid of the type of analysis this Court has recently performed in its low scrutiny evaluations. This Court has recently applied minimum scrutiny to strike down statutes with residency requirements that were either durational or tied to a fixed date prior to the legislation. Williams v. Vermont, _____ U.S.___, 86 L.Ed.2d 11 (1985); Hooper v. Bernalillo County Assessor, ____U.S. ____, 86 L.Ed.2d 487 (1985); Zobel v. Williams, 457 U.S. 55 (1982). Each opinion involved a detailed analysis of possible rationales for the

legislation, and a detailed discussion of the presence of, or lack of, logical fit between the purported reasons and the statutes at issue. The Second Circuit has explicitly followed the Zobel mode of analysis in a case involving residency issues. See Soto-Lopez v. New York City Civil Service Commission, 755 F.2d 266 (272-77 (2d Cir. 1985)(Zobel followed in detailed minimum scrutiny analysis striking down law disadvantaging state civil service applicants who had entered m litary service while residing in another state).

Outside the Fifth Circuit, Zobel has been seen to require a detailed analysis of rationale and purpose as a standard part of minimum scrutiny. In cases that did not involve Zobel-type residency issues, the Seventh and Ninth Circuits explicitly applied the mode of analysis used in Zobel. See Evan v. City of Chicago, 689 F.2d 1286, 1299-1300 (7th Cir. 1982) (Zobel followed in detailed minimum scrutiny analysis striking down statute mandating state tort



claims under $1,000 be paid before those over $1,000); Park v. Watson, 716 F.2d 646, 654-55 (9th Cir. 1983)(Zobel followed in detailed minimum scrutiny analysis striking down distinctions drawn by city in responding to requests to vacate platted streets). This Court, in striking down the zoning ordinance in Cleburne v. Cleburne Living Center, ____ U.S. ____, 87 L.Ed.2d 313 (1985), undertook a detailed Zobel-type examination as part of the standard rational basis review. 87 L.Ed.2d at 325-26.

In the instant case, the minimum scrutiny analysis applied by the Fifth Circuit is completely unlike that applied by this Court or the Second, Seventh, and Ninth Circuits:

> [A] funding difference is not a denial of equal protection unless it lacks a rational basis. San Antonio Independent School District v. Rodriguez, 411 U..S 1, 98 S.Ct. 1278, 36 L.Ed.2d 16 (1973). That rationality is found in the state's structure of school finances. With land values as a base and desired local administration of local

schools,income differences are inevitable.

-Papasan, 756 F.2d at 1095.

This analysis does not take as its touchstone the underlying purpose of a school finance structure--maintenance and support for education. Instead, without any inquiry or analysis to undergird it,[8] the Fifth Circuit's holding simply assumes that Mississippi's school financing structure is rationally-related to the support of education, despite the fact that such rationality is precisely the notion challenged in this lawsuit. The Fifth Circuit fails to examine whether there is any logical connection between the purpose of furthering education (or any permissible purpose) and a decision by the state officials to divest the Chickasaw Cession schools of their sixteenth-section lands,[9] the effect of which is to deny the children of the Chickasaw Cession a minimally adequate education.

The Fifth Circuit applied a method of rational basis review completely different from that announced by this Court and applied by the Second, Seventh, and Ninth Circuits. There is thus a conflict among the circuit courts of appeal as to the

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8 This total lack of analysis is necessarily the case because there is literally no evidence upon which to base any finding regarding the rationality of the school financing structure. Given the procedural posture of this case, the only "evidence" before the Fifth Circuit was the Complaint and exhibits filed by the plaintiff schoolchildren--and these documents clearly show that state officials misfeasance of the school lands trust cannot be rationally-related to providing education. As a matter of law, only after a full trial on the merits, after each side has offered its proof of the rationality or irrationality of the school financing sytem, can a trier of fact make a rational-relation determination. As in San Antonio Independent School District v. Rodriquez, where no summary dismisal was allowed, the school chidren in this case should have been allowed a chance to prove their claim. The finding by the Fifth Circuit, despite an absence of supporting evidence, underlines the specious nature of the rational basis finding.

9 Despite our reliance on Zobel when briefing the lower court, the Fifth Circuit failed to mention the case in its opinion.

proper mode of analysis for rational basis review. Guidance from this Court on this issue is needed.

WHEREFORE, in view of the aforesaid reasons, petitioners respectfully urge this Court to grant the writ to review the decision of the Court of Appeals.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, T.H. FREELAND, III, counsel of record for petitioners, hereby certify that I have this day mailed, postage prepaid, three true and correct copies of the above and foregoing Petition for Writ of Certiorari to the following, to-wit:

R. Lloyd Arnold, Esquire
Special Assistant Attorney General
Post Office Box 220
Jackson, Mississippi 39205

This, the 16 day of September, 1985.

T.H. FREELAND, III

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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NO. 84-4109

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B.H. PAPASAN, Superintendent
of Education, et al.
Plaintiffs-Appellants

versus

UNITED STATES OF AMERICA, et al.
Defendants

THE STATE OF MISSISSIPPI, et al.
Defendants-Appellees

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Appeal from the
United States District Court
for the Northern District of Mississippi

ON SUGGESTION FOR REHEARING EN BANC

(Opinion April 5, 5 Cir., 1985, F.2d )

( May 21, 1985 )

Before THORNBERRY, REAVLEY & HIGGINBOTHOM,
Circuit Judges

PER CURIAM:

( X ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the



Court be polled on rehearing en banc (Federal Rules of appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

's/ P.E. HIGGINBOTHAM
United States Circuit Judge

**B.H. PAPASAN, Superintendent of Education, et al., Plaintiffs-Appellants**

**v.**

**UNITED STATES of America, et al. Defendants-Appellees.**

**No. 84-4109.**

United States Court of Appeals
Fifth Circuit

April 5, 1985.

Before THORNBERRY, REAVLEY and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

A number of county school boards, superintendents of education, and individual schoolchildren in twenty-three Northern Mississippi counties attacked the administration of Mississippi's school lands trust in a suit against federal and state officials. The district court dismissed the complaint against the state defendants on limitations and Eleventh Amendment grounds and the claims against the federal defendants have since been



abandoned. Finding all claims either insufficient under the Fourteenth Amendment or barred by the Eleventh Amendment, we affirm.

I

-1-

In its western expansion, the United States encouraged public education by granting school lands to newly-admitted states.[1] The Land Ordinance of 1785, which provided for the survey and sale of the Northwest Territory,[2] thus "reserved the lot No. 16, of every township, for the maintenance of public schools within the said township..." 1

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1 See Andrus v. Utah, 446 U.S. 500, 22-28, 100 S.Ct. 1803, 1814-17, 64 L.Ed.2d 458 (1980)(Powell, J., dissenting) for a historical overview of school land grants in this country.

2 The Northwest Territory included all of the land west of the original thirteen states, north of the Ohio River, east of the Mississippi River and south of Canada. Public Land Law Review Commission, History of Public Law Development, Ch. 1-3 (1968).

Laws of the United States 565 (1815).[3] Though title to Sixteenth Section land vested in the state upon approval of the federal survey, the state had a "binding and perpetual obligation to use the granted lands for the support of public education." Andrus v. Utah, 446 U.S. 500, 523, 100 S.Ct. 1803, 1815, 64 L.Ed.2d 458 (1980)(Powell, J., dissenting). All proceeds from the sale or lease of such land were thus "impressed with a trust in favor of the public schools." Id. at 523-24, 100 S.Ct. at 1815. Hence the term, "school lands trust."

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3 The Northwest Territory and all territory acquired thereafter was divided by survey into townships of thirty-six numbered sections, each one square mile in area. "Sixteenth Section" land thus refers to section number sixteen, reserved in each township for public schools. The Northwest Ordinance of 1789, which provided for the government of the Northwest Territory, 1 Stat. 50, echoed the policy behind this reservation declaring: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." 1 Stat. 52.



A similar history attends the land south ofthe Ohio River. Under its charter from England, Georgia held claim to most of what now comprises the states of Georgia, Alabama and Mississippi. In 1802, Georgia ceded these territories to the United States, on the condition that they would eventually attain statehood with the same privileges and rights granted the inhabitants of the Northwest Territory under the Northwest Ordinance of 1789.[4] In 1803, Congress provided for the survey and disposition of all lands south of the state of Tennessee to which Indian title had been extinguished. 2 Stat. 229 (1803).

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4 See Articles of Cession and Agreement, April 24, 1802, V Territorial Papers of the United States, 142 (1802)· 802 Laws of Georgia, No. 35, art. 1, 5th Condition.

Earlier, in 1789, Congress estabished the Mississippi Territory, comprising what is now the southern two-thirds of Mississippi and Alabama, and provided that it be governed by the provisions of the Northwest Ordinance of 1789. 1 Stat. 549, 550, § 6 (1798). The Mississippi Terriory was extended in 1804. 2 Stat. 303, § 7 (1804)

As with the Northwest Territory, Sixteenth Sections were reserved, 2 Stat. 229, Ch. 27, § 12 at 234 (1803) and their lease authorized, 3 Stat. 163 (1815), for the support of the public schools within each township.[5] In 1817, Congress authorized the formation of the State of Mississippi, 3 Stat. 348 (1817), the survey of its lands, and the reservation of Sixteenth Sections. 3 Stat. 375 (1817). "Title" to certain land in Northern Mississippi, however, remained in the Chickasaw Indian Nation.[6] These Indian claims were not extinguished until 1832,

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5
Because some of this Sixteenth Section land was subject to the prior claims of settlers and grantees, Congress authorized the Secretary of the Treasury to select substitute school lands in lieu of unavailable reserved sections. 2 Stat. 400, 401, § 6 (1806).

6
Apparently there was dispute in the court below as to whether any of the pre-1832 Acts of Congress reserving Sixteenth Section land for public schools applied to the Chickasaw Indian land. We need not face these issues here.



when, pursuant to the Treaty of Pontotoc Creek, the Chickasaw Indians ceded all of their lands east of the Mississippi River to the United States. 7 Stat. 381 (1832).[7] Under this Treaty, all of the Chickasaw Cession lands were to be surveyed by the United States, and sold to private parties, with the proceeds to the Chickasaw Nation. Unlike other government land sales, however, no Sixteenth Section land was reserved from the sale of the Chickasaw lands. See City of Corinth v. Robertson,

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7
The Chickasaw Cession territory encompassed the twenty-three North Mississippi counties in which the plaintiffs reside. These counties include: Alcorn, Benton, Calhoun, Chickasaw, Clay, Coahoma, DeSoto, Itawamba, Lafayette, Lee, Marshall, Monroe, Panola, Pontotoc, Prentiss, Quitman, Tate, Tippah, Tishomingo, Tunica, Union, Webster and Yalobusha Counties. Of these, Coahoma, Quitman, Webster and Yalobusha are only partly within the Cession.

125 Miss. 31, 87 So. 464 (1921).[8] This case has its genesis in that circumstance.

To remedy this deficiency, Congress in 1836, authorized the selection of other unsold public land in the Chickasaw Cession, equal to and in lieu of the unreserved Sixteenth Sections. Once selected, these lands were to "vest in the State of Mississippi for the use of schools within said territory in said State." 5 Stat. 116, § 2 (1836).[9] After the Mississippi Legislature accepted the

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All of the Chickasaw lands were sold despite the fact that the Treaty provided that the land would be surveyed and sold "in the same manner and on the same terms as other public lands...." Art. II, Treaty of Pontotoc Creek.

9
Though Congress originally authorized the Secretary of the Treasury to select lieu lands, it later allowed Mississippi's Governor to direct the selection. 5 Stat. 490 (1842).



Chickasaw Cession Lieu Lands,[10] 1844 Miss.Laws Ch. LXVII at 238, it authorized their ninety-nine-year lease, "renewable forever," at a price not less than six dollars per acre, with the proceeds therefrom "to be held in trust by said state for the use of schools in the Chickasaw Cession." 1848 Miss.Laws Ch. III at 62. In 1852, apparently to clarify Mississippi's authority to lease or sell its lieu land, see Jones v. Madison County, 72 Miss. 777, 794-95, 18 So. 87 (1895), Congress ratified all past leases and authorized the State to sell the lands for the support of the Chickasaw Cession schools. 10 Stat. 6 (1852). The Mississippi Legislature then authorized the fee sale of the Chickasaw Cession Lieu Lands and directed that the sales proceeds be invested in eight percent loans to the

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10
The Chickasaw Cession Lieu Lands comprised some 174,555 acres located in the counties of Bolivar, Coahoma, Tallahatchie, Quitman, Panola and Leake.

State's railroads. 1856 Miss.Laws Ch. LVI. Most of the investment was lost when the railroads were destroyed in the Civil War.

Since then, the Mississippi Legislature has appropriated monies to replace the interest lost on its failed investment, see 1878 Miss.Laws, Ch. IX at 86, first at eight and later at six percent. See Miss. Const. Art. VIII, § 212 (1890) These funds are paid each year to the Chickasaw Cession counties for the support of their public schools in lieu of the returns on the unreserved Sixteenth Section lands or the ill-disposed Lieu Lands. Under this current system, the highest annual receipt from the lieu land appropriation in the Chickasaw Cession in 1980 was $4,586.72 or $.80 per student, as compared to the $69,112.34 or $31.25 per pupil average realized from the school lands trusts in other Mississippi counties.



Plaintiffs and intervenors here include a group of county school boards,



superintendents of education, and individual school children, all residing in the Chickasaw Cession counties in North Mississippi.[11] In June of 1981, these plaintiffs sued certain federal and state officials attacking the difference between the school lands appropriations to the Chickasaw Cession and the monies paid to other schools from trust funds. The state defendants include the State of Mississipi,

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[11] The plaintiffs also sought to bring the action as a class, defined as

> All children residing in the counties within the Chickasaw Cession Territory in Northern Mississippi, who are of school age or who may become of school age (including children not yet in being) and all children residing in said Territory and who may in the future become of school age and all children who at this time are attending or who may in the future attend the public schools in any of said school districts and counties within the Chickasaw Cession Territory.

The district court held the motion for class certification in abeyance pending resolution of the defendants' motions to dismiss.

its Governor, the Secretary and Assistant Secretary of State, the Superintendent of Education, and members of the State Board of Education and the Lieu Land Commission, sued in official and successor capacities.

The complaint chronicled purported "illegalities" dating back to the Northwest Ordinance of 1785. It sought a declaratory judgment that various federal acts and treaties, as well as certain Mississippi enactments, were "unlawful, void, and unenforceable" insofar as they purported to authorize the sale of the Chickasaw Cession Sixteenth Section Lands or Lieu Lands. The complaint also alleged that both the federal and state defendants had breached perpetual and binding obligations of the school lands trust. The claims against the federal defendants were specifically based on breach of promise to fund the Chickasaw Cession trust and failure to prevent the State of Mississipi from wasting trust property. The State defendants allegedly breached their trust duties by improperly



investing the proceeds from the unlawful sale of the Chickasaw Cession Lieu Lands. The complaint also alleged a claim under 42 U.S.C. § 1983, asserting that the Stateviolated both the due process and equal protection guarantees of the Fourteenth Amendment by allotting the Chickasaw Cession counties disproportionate school lands appropriations, thereby depriving their schoolchildren of a "minimally adequate level of education."[12]

The complaint prayed for a wide range of relief, including a "conveyance of...real and/or personal property (including money) of equivalent income producing value" to the Chickasaw Cession Sixteenth Sections and/or Lieu Lands and asked that the defendants "acquire, set

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[12] The complaint also alleged constitutional claims under the contract clauses of the Mississippi and United States Constitutions, the Fifth Amendment's prohibition against taking without just ensation, and the Ninth Amendment.

aside and make available" new lieu lands. Additionally, the plaintiffs sought to "enjoin" and "direct" the defendants to establish "a fund or funds of such value" as was reasonably necessary to provide "hereafter" and "in perpetuity" annual income to the Chickasaw Cession school districts at an "equitable and just" level, equivalent to what the Chickasaw Cession districts would enjoy if the State still owned the unlawfully sold land. The plaintiffs also sought to be "compensate[d] and ma[d]e whole" for the income and interest lost through imprudent trust management from 1832 to the present. Finally, the plaintiffs requested that the defendants take whatever other steps were reasonably necessary to "[e]liminate and compensate and for the future guarantee and protect plaintiffs and the plaintiff class against...denials and deprivations of their rights to due process of law and to the equal protection of the laws," and then to "[d]evelop, prepare and file with the



Court...a plan for the orderly implementation of the declaratory and injunctive relief otherwise granted."

After "accepting as true all factual allegation made by plaintiffs," the district court granted all motions to dismiss. The court held the claims against the federal defendants barred by sovereign immunity, laches, and statutes of limitations. This order dismissing the federal defendants is not before us, as its appeal has been dismissed by joint stipulation. By separate order, the district court also dismissed the action against the state defendants. The court held that all of the state actions complained of were before the expiration of any applicable statute of limitations and that "any monetary remedy [was] barred by the Eleventh Amendment to the United States Constitution." The district court held that under Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), it lacked

jurisdiction to entertain any "viable equal protection claim for relief *in futuro*" under the Mississippi Constitution and that any such claim was "likewise barred by the Eleventh Amendment because the only possible relief could come only from a monetary award against the state treasury." Plaintiffs appeal the dismissal of their claims against the state defendants.

II

The state defendants defend the order dismissing them on Eleventh Amendment grounds, urging that the suit was against the State of Mississippi itself over which the federal court lacked jurisdiction; that while state officers were nominally sued in their official capacities, the State was the real party in interest. The argument continues that regardless of how characterized, the requested "dollars or dirt" relief would inevitably expend itself on the public treasury. We agree.



The Eleventh Amendment is a jurisdictional bar to federal court suit by private citizens against a state. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L Ed.2d 662 (1974); *Chiz's Motel & Restaurant, Inc. v. Mississippi State Tax Commission*. 750 F.2d 1305, 1307 (5th Cir. 1985). In the absence of express consent[13] the Eleventh Amendment proscribes suits in federal court against the state and its agencies, regardless of the type of relief sought. *Pennhurst*, 104 S.Ct. at 908. The district court thus correctly dismissed the complaint insofar as it sought relief directly from the State.



The Eleventh Amendment also reaches claims against state officers when they are nominal defendants and the state is "the

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[13] Mississippi has expressly preserved its immunity from suit in federal court. *See* 1984 Miss. Laws ch. 495, § 3(4).

real substantial party in interest." Ford Motor Company v. Department of Treasury, 323 U.S. 459, 464, 65 S.Ct. 347, 350, 89 L.Ed. 389 (1945). The state is the real party in interest when the relief sought would operate against the sovereign by expending itself on state coffers. Pennhurst, 104 S.Ct. at 908-09; Quern v. Jordan, 440 U.S. 332, 337, 99 S.Ct. 1139, 1143, 59 L.Ed.2d 358 (1979); Edelman, 415 U.S. at 663-64, 94 S.Ct. at 1355-56. Thus, the Eleventh Amendment disables a federal court from awarding retroactive "monetary relief from the state in the form of compensatory damages, punitive damages, or monetary awards in-the nature of equitable restitution...." Clay v. Texas Women's University, 728 F.2d 714, 715 (5th Cir. 1984) (emphasis added). See also Chiz's Motel, 750 F.2d at 1307; Emory v. Texas State Board of Medical Examiners, 748 F.2d 1023, 1025 (5th Cir. 1984); Karpovs v. State of Mississippi, 663 F.2d 640, 643 (5th Cir. 1981).



The complaint here sought monetary relief as comepenation or restitution for past wrongs. It was cast in the language of damages, seeking "[f]irst and foremost...the establishment of a trust fund...or an order for an annual legislative appropriation in an amount necessary to make whole Plaintiffs...." As a means to this end, it prayed for the conveyance of property, "including money," equivalent in value to the lost Sixteenth Section lands or the unlawfully sold lieu lands. It requested that a fund be established "to compensate, reimburse and make restitution to each of said school districts" for all of the income and interest they each would have received "from 1832 until the present" if such lands had been available and subjected to prudent trust management. The complaint also asked that new lieu lands be "acquire[d], set aside and ma[d]e available for the use and benefit of Plaintiffs" and their class. Such relief was retroactive in character

and satisfiable only from the Mississippi treasury.

-3-

Plaintiffs concede that the district court correctly dismissed their suit insofar as it sought retroactive monetary relief. They argue, however, that because they also sought prospective injunctive relief against state officials alleged to have acted unconstitutionally or in violation of federal law, Pennhurst, 104 S.Ct. at 909; Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), it was error to dismiss the suit in its entirety. See ACLU of Mississippi v. Finch, 638 F.2d 1336, 1341 (5th Cir. 1981); Gay Student Services v. Texas A & M University, 612 F.2d 160, 164-65 (5th Cir.), cert. denied, 449 U.S. 1034, 101 S.Ct. 608, 66 L.Ed.2d 495 (1980).

The complaint alleged that the state defendants denied rights secured by the Congress and the Constitution. The first claim is that the United States, in



granting Mississippi the Chickasaw Cession Lieu Lands, imposed a binding and perpetual trust obligation on the State as trustee to administer the lands in support of public education, and that the lieu land mismanagement breached the fiduciary duties assumed when the lieu lands were set aside by the federal government and accepted by the State. See Andrus, 446 U.S. at 507, 100 S.Ct. at 1807 (school lands grant a "solemn agreement"); id. at 523, 100 S.Ct. at 1815 (Powell, J. dissenting) (federal land grant imposes "binding and perpetual obligation" on state); Lassen v. Arizona Highway Department, 385 U.S. 458, 460, 87 S.Ct. 584, 585, 17 L.Ed.2d 515 (1967) ("United States has a continuing interest in the administration of both the lands and the funds which derive from them"). See also United States v. 111.2 Acres of Land in Ferry County, Washington, 293 F.Supp. 1042, 1049 (E.D. Wash. 1968), aff'd, 435 F.2d 561 (9th Cir. 1970). The State replies that the school lands grant was an

absolute gift to the State to deal with as it pleased and creating no federal legal obligation. See Alabama v. Schmidt, 232 U.S. 168, 173-74, 34 S.Ct. 301, 302, 58 L.Ed. 555 (1914); Cooper v. Roberts, 59 U.S. (18 How.) 173, 15 L.Ed. 338 (1855) (public land grant imposes merely "honorary" obligations).

It matters little how we characterize Mississippi's school lands trust obligations. Assuming that a binding federal compact was created and breached over a century ago, the federal courts have no jurisdiction to address the breach, given the nature of the relief sought. To the extent that the defendants' management of the Chickasaw Cession Lieu Lands violated the Mississippi law of trusts, see Tally v. Carter, 318 So. 2d 835, 838 (Miss. 1975)(Sixteenth Section land held in trust by state); Keys v. Carter, 318 So. 2d 862, 864 (Miss. 1974)(rules applicable to trusts and trust property generally apply to school lands); Holmes v. Jones, 318 So. 2d



865, 869 (Miss. 1975)(applying Mississippi fiduciary law to school lands suit), the complaint is likewise proscribed. The Eleventh Amendment deprives a federal court of pendent jurisdiction over state law claims regardless of the type of requested relief. Pennhurst, 104 S.Ct. at 908; Kitchens v. Texas Department of Human Resources, 747 F.2d 985 (5th Cir. 1984).

The complaint also alleged that the failure to provide the Chickasaw Cession school districts with funding equivalent to that received by districts in the rest of the state violated the equal protection clause of the Fourteenth Amendment "by creating a distinction without rational basis or substantial justification." Such unconstitutional action, plaintiffs contend, stripped the state defendants of any official or representative character and thus of any Eleventh Amendment immunity. Ex parte Young, 209 U.S. at 160, 28 S.Ct. at 454; Finch, 638 F.2d at 1340. They argue that in addition to restitution, they

sought to prospectively enjoin the continuing and allegedly unlawful administration by the defendants of Mississipi's school lands appropriations. Such prospective relief, they continue, is constitutionally permissible, even though it may have a costly ancillary effect on the state treasury.

A federal court can enjoin state officials to correct a constitutional deficiency or eliminate an unconstitutional status even though expenditures incident to that order will expend themselves on the public treasury. See Milliken v. Bradley, 433 U.S. 267, 289, 97 S.Ct. 2749, 2761, 53 L.Ed.2d 745 (1977); Edelman, 415 U.S. at 667-68, 94 S.Ct. at 1357-58; Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); Goldberg v. Kelly, 3917 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). The fact that a complaint is phrased in declaratory or injunctive terms, however, is not dispositive. A court rust scrutinize the pleadings to determine what



in essence is sought for "the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief." Pennhurst, 104 S.Ct. at 909 (emphasis added).

The complaint sought to "enjoin" and "direct" the defendants to provide plaintiffs "hereafter" and "in perpetuity" annual income equivalent to what the Chickasaw Cession schools would enjoy if the lieu lands had not been sold and the proceeds improperly invested. Such relief is the type of equitable restitution condemned in Edelman, 415 U.S. at 668, 94 S.Ct. at 1358. Like the Edelman injunction, the relief sought here "requires the payment of state funds, not as a necessary consequence of compliance in the future with substantive federal-question determination, but as a form of compensation," id., for legal breaches which occurred more than one hundred and fifty years ago. The complaint

particularized no remedy other than ordering the State to convey land or funds. Such relief certainly would have more than an ancillary effect on the state treasury.

But a federal court should not dismiss a constitutional complaint because it "seeks one remedy rather than another plainly appropriate one." Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 65, 99 S.Ct. 383, 387, 58 L.Ed.2d 292 (1978). Giving the complaint the generous reading due, we can postulate a prospective non-compensatory remedy that arguably flanks the Eleventh Amendment. That claim would shift in focus from the past maladministration of the trust to the present difference in income distributions. By necessity, it would rest on elimination of a perceived presently existing unconstitutional status, such as a prison so inadequate as to violate the Eighth



Amendment.[14] But, there is no present unconstitutional status to rectify. "While a meritorious claim will not be rejected for want of a prayer for appropriate relief, a claim lacking substantive merit obviously should be rejected." See Id. at 66, 99 S.Ct. at 387.

The only arguable current unconstitutional status is the difference between the school lands appropriations to the Chickasaw and to the non-Chickasaw Cession counties. While it is claimed that the difference deprived the schoolchildren of their "right" to a minimally adequate level of education, the plaintiffs admit that they have not sustained an absolute deprivation of educational opportunity. Cf. Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). The complaint

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[14] The plaintiffs point to such prison condition cases in support of their argument. See, e.g., Williams v. Edward, 547 F.2d 1206, 1213 (5th Cir. 1977); Nadeau v. Helgemoe, 561 F.2d 411, 419 n.7 (1st Cir. 1977).

is not that the Mississippi Legislature decides each year to grant the children in the southern counties of the state $31.25 per student, while limiting per pupil appropriations to the Chickasaw Cession to $.80. The southern Mississippi counties still derive income from existing Sixteenth Section or Lieu Lands. School lands appropriations vary even among the southern counties, due to differences in the current values of their lands and the relative financial skills of the local trust administrators.[15] Plaintiffs' argument is then by necessity, that their receipt of less school lands money than that received by southern counties reduces the quality of education below that provided children in non-Chickasaw Cession districts. Apart from the fact that there is no necessary

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[15] Miss. Code Ann. § 29-3-1 et seq. (Supp. 1983) designates local boards of education as the managers of the school lands under the general supervision of the state land commissioner.



correspondence between the amount of money spent and the quality of education, such a funding difference is not a denial of equal protection unless it lacks a rational basis. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). That rationality is found in the state's structure of school finances. With land values as a base and desired local administration of local schools, income differences are inevitable.

Part of the income difference here is attributed to the historical fact that there are no school lands in the Chickasaw Cession to be administered. As was earlier recounted, they were sold and the proceeds invested in the Mississippi railroads that were destroyed in the Civil War. Since 1878, the State has attempted to remedy this bad investment by annual appropriations to the Cessions counties of funds equivalent to six percent of the Lieu Land proceeds loaned to the railroads. The State's failure to adjust these

appropriations to keep step with rising inflation over one hundred and fifty years is no violation of equal protection. The State has continued, however, inadequately, to attempt to remedy the consequences of its ill-fated investment. In pursuing this legitimate, remedial goal, the State need not achieve complete success. New Orleans v. Dukes, 427 U.S. 297, 305, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976); Williamson v. Lee Optical Co., 348 U.S. 483, 489, 75 S.Ct. 461, 565, 99 L.Ed.2d 563 (1955).

When the overlay of the Civil War loss of a revenue source is removed, we are left with an equal protection attack upon Mississippi's financing of public education. We cannot in a material way distinguish this claim fromthat rejected in Rodriguez.

-4-

Plaintiffs advance two other arguments to support their claim that the Eleventh Amendment is inapplicable. The first contend that the school board plaintiffs are arms of the State authorized to enforce



claims belonging to Mississippi as trustee without jurisdictional impediment. They then argue that the policies underlying the school lands trust agreements impliedly override any Eleventh Amendment immunity. Both contentions are without merit.

We do not reach the merit of plaintiffs' first argument because county school districts are not arms of the State. We have held that under applicable state law, the county school systems in Mississippi are primarily local institutions not entitled to Eleventh Amendment protection. Adams v. Rankin County Board of Education, 524 F.2d 929, 929 (5th Cir. 1975), cert. denied, 438 U.S. 904, 98 S.Ct. 3121, 57 L.Ed.2d 1146

(1978).[16] Cf. Jagnandon v. Giles, 538 F.2d 1166, 1174 (5th Cir. 1976), cert. denied, 432 U.S. 910, 97 S.Ct. 2959, 53 L.Ed.2d 1083 (1977)(Mississippi State University is an arm of state). See also Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)("state" does not include political subdivisions, which under Ohio law, encompassed school districts andboards). The county school boards were thus "citizens" within the meaning of the Eleventh Amendment. See County of Monroe v. State of Florida, 678 F.2d 1124, 1130-31 (2d Cir. 1982), cert. denied, 459 U.S. 1104, 103 S.Ct. 726, 74 L.Ed.2d 951 (1983).

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16 Though the question of whether an entity is an arm of the state for Eleventh Amendment purposes is one of federal law, "federal courts must examine the powers, characteristics, and relationships created by state law" to determine if an action is really one against a "state." Hander v. San Jacinto Junior College, 519 F.2d 273, 279-80, clarified, 522 F.2d 204, 205 (5th Cir. 1975)(under Texas law, school districts are independent political corporations distinct from state itself).



The plaintiffs also argue that Mississippi has impliedly waived its constitutional immunity to federal court suit by virtue of the educational and land grant policies underlying the eighteenth century Acts of Congress which created the school lands trusts. Such implied consent, however, requires that a state enter into a federally-regulated sphere where a private cause of action is provided for violation of a federal regulatory statute. Congress must also expressly indicate that the private remedy is applicable to the states. Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973). The plaintiffs point to no federally-created private claim regarding Sixteenth Section trusts. Nor is there any indication that Congress has expressly abrogated a state's Eleventh Amendment protection in this area.

III

We agree with the district court that regardless of how the plaintiffs characterized their action, "the only possible relief could [have] come only from a monetary award against the state treasury." Insofar as plaintiffs sought to remedy an asserted unconstitutional status under the Fourteenth Amendment, they stated no claim. The court lacked jurisdiction over their other claims. We do not reach the question of whether the suit was barred by relevant periods of limitation. Dismissal of the complaint is AFFIRMED.



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

B.H. PAPASAN, et al.

Plaintiffs

- vs - CIVIL ACTION NO. DC 81-90-WK-O

UNITED STATES OF AMERICA,
et al.

Defendants

O R D E R

This matter came on to be heard on the Motions to Dismiss filed by the State of Mississippi and other state defendants, including the Governor of the State, the Secretary of State, the members of the state Board of Education, members of the state Lieu Land Commission, the state Superintendent of Education, the state Attorney General, and the Assistant Secretary of State, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, and the Court being advised in the premises

and having heard arguments of counel and considered the briefs filed in support thereof and in opposition thereto, holds that said Motions to Dismiss are well taken and should be sustained.

The Court finds that all actions taken by the State of Mississippi and the predecessors in office of the above named defendants prior to the acts of Congress on May 19, 1852, as well as all actions taken by the State of Mississippi and its officers and officials in the investment of the funds derived from the sale of lieu lands are barred by the statute of limitations and any monetary remedy is barred by the Eleventh Amendment to the United States Constitution. Pennhurst v. Halderman [No. 81-2101, decided January 23, 1984, 52 U.S.L.W. 4155]; Edelman v. Jordan, 415 U.S. 651, 39 L.Ed. 662, 94 S.Ct. 1347 (1974); Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459, 89 L.Ed. 389, 65 S.Ct. 347 (1945); Worchester County Trust Co. v. Riley, 302 U.S. 292, 82 L.Ed. 268,



58 S.Ct. 185 (1937); Florida Dept. of Health v. Florida Nursing Home Association, 450 U.S. 147, 67 L.Ed.2d 132, 101 S.Ct. 1032.

The Court holds that the issue of whether the plaintiffs have a viable equal protection claim for relief in futuro under Section 212 of the Mississippi Constitution of 1890 as a denial of equal protection is beyond the jurisdiction of the Court as set forth in Pennhurst v. Halderman, supra, and likewise barred by the Eleventh Amendment because the only possible relief could come only from a monetary award against the state treasury.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the complaint filed against the State of Mississippi and all named state defendants in this cause is hereby dismised with prejudice.

This is the final order and judgment of the Court in this case.

SO ORDERED, this the 30 day of January, 1984.

/s/ J.P. COLEMAN
UNITED STATES CIRCUIT JUDGE
Sitting by designation as a Judge of the United States District Court for the Northern District of Mississippi